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IN THE SUPREME COURT OF THE UNITED STATES

THE FIRST NATIONAL BANK OF LOGAN, Logan, Utah, A National Banking Association,
Petitioner

vs.

WALKER BANK & TRUST CO., a corporation,
Respondent

October Term 1965

No.....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

The First National Bank of Logan, Utah, petitioner prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit entered October 26, 1965, in the above case of Walker Bank & Trust Company, a corporation, v. James J. Saxon, Comptroller of the Currency and The First National Bank of Logan, Utah, a National Banking Association, No. 7981. The First National Bank's motion for rehearing on the grounds that the District Court lacked jurisdiction was denied on December 3, 1965.

OPINION BELOW

The opinion of the District Court for Northern District of Utah is reported at 234 F. Supp. 74.

The opinion of the Court of Appeals for the Tenth Circuit is reported at .....352 F. 2d 90.....

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit in the above case was made and entered on October 26, 1965. The First National Bank's petition for rehearing was denied on December 3, 1965.

The jurisdiction of The Supreme Court of the United States is invoked under Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

Respondent, Walker Bank and Trust Company, of Salt Lake City, Utah, brought action to have the Certificate of Authority granted by the Comptroller of the Currency to The First National Bank of Logan to operate a branch in Logan, Utah, declared illegal because it did not comply with requirements of Utah law which Walker Bank alleged was required by 12 U. S. C. Section 36 (c) and to enjoin The First National Bank of Logan, Utah, from continuing to operate its branch. Walker Bank alleged it would be irreparably injured and damaged in excess of $10,000 if the injunction was not issued, which

allegations were denied by the defendants. Walker Bank presented no evidence to the District Court that it had been or would be damaged by the continued operation of the branch. The District Court nevertheless denied The First National Bank's motion to dismiss based on lack of jurisdiction, there being no showing that the amount in controversy exceeded $10,000, but the District Court did dismiss the Complaint of Walker Bank on the grounds that the Comptroller was within his statutory authority in authorizing the branch. On appeal to The Court of Appeals for the Tenth Circuit, the decision of the District Court was reversed on the merits but was silent as to the question of jurisdiction raised by The First National Bank. The questions presented are:

1. *Does a Federal District Court have jurisdiction to hear a complaint by a state bank that a National bank's intra-city branch was illegally established and asking that its continued operation be enjoined where there was no showing that the amount in controversy exceeded $10,000 as the state bank presented no evidence that there was or would be damage to the state bank's business by the continued operation of the National bank's branch, and the defendant National bank's pleading denied that the state bank would be damaged?*

If this question is answered in the negative the second question need not be answered. If it is answered in the affirmative then the following question remains:

2. *Whether Congress in the National Banking Act, 12 U. S. C. Section 36 (c) intended that National Banks*

are subject to the identical restrictions of state law as state banks in establishing a branch within the limits of their own community?

STATUTES AND FEDERAL RULES INVOLVED

Question No. 1:

United States Code, Title 28:

Section 1331 (p. 5019), 72 Stat. 415:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Rules of Civil Procedure, Rule 12 (h) (p. 5138):

(2) that, wherever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Question No. 2:

United States Code, Title 12:

Section 36 (p. 2068), 76 Stat. 667:

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches; (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at

the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: Provided, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and surplus equal to the combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock.

STATEMENT OF THE CASE

Petitioner First National Bank of 99 North Main Street, Logan, Utah, applied to the Comptroller of the Currency for permission to establish a branch at 466 North Main Street in Logan, Utah, on November 9, 1962. Prior to that time The First National Bank had no branch. The Respondent, Walker Bank & Trust Company of Salt Lake City, Utah, a State bank, and The First Security Bank of Utah, of Ogden, Utah, a National bank (not a party to this proceeding) were at the time and are now operating branches in Logan, Utah.

The Comptroller requested John Wanless, Jr. a National Bank Examiner to investigate The First National Bank's application and in the course of his investigation between November 27 and 29, 1962 he advised Reed Holt, President of Walker Bank, of the application. But Walker Bank took no action thereon. The Comptroller approved the application and on January 21, 1963 issued his certificate of authority granting permission to The First National Bank to establish a branch bank on North Main Street in Logan, Utah. On the same day The First National Bank established a branch and it has continued to operate since that time.

On July 9, 1963, Plaintiff Walker Bank, commenced this action and asked for a judgment declaring that the authorization of the Comptroller for the branch was prohibited by Title 12, United States Code, Section 36 (c) and for an order compelling the Comptroller to rescind the certificate and restraining the defendant bank from

establishing or operating a branch bank in the city of Logan on the grounds that even though Utah State law expressly authorizes branch banking the defendant National bank must also comply with the portions of Utah law requiring a bank seeking to branch to take over another unit bank where one is located in the city *even though there was no other unit bank in Logan which The First National Bank could take over.*

Walker Bank alleged in its complaint the basis for jurisdiction of the Federal District Court as required by Rule 8 (a) (1) of the Federal Rules of Civil Procedure, Title 28, United States Code as follows:

> "This action arises under Section 36 of Title 12 of the United States Code commonly referred to as the National Banking Act. As hereinafter set forth, plaintiff is engaged in the banking business in the State of Utah and in the said City of Logan where it has a large investment in capital, property, equipment and good will and irreparable damage will be sustained by plaintiff unless the relief herein prayed for is granted. The amount in controversy exceeds, exclusive of interest and costs the sum of $10,000."

Defendant First National Bank of Logan denied the allegation above set forth in paragraphs 1 and 7 of its third defense and in said paragraph 1 not only denied that Walker Bank would be damaged but alleged that it would be benefitted by Defendant's branch:

> "This defendant denies that irreparable damage will be sustained by plaintiff unless said relief is granted and alleges that no damage will be sustained by plain-

tiff, in fact, under a National Emergency plaintiff may be benefitted by the establishment of a new branch bank of this defendant as authorized by the Comptroller of Currency."

On April 24, 1964, the parties entered into a stipulation of facts and other matters which contained no fact showing that Walker Bank has been or would be damaged by The First National Bank's branch. The parties did agree as follows:

> "6. At the time of the commencement of this action: Plaintiff had demand and time deposits at its Cache Valley Branch in Logan, amounting to in excess of $5,000,000 which has been made at said Cache Valley Branch; and it has an investment in furniture, fixtures and leasehold improvements at the Cache Valley Branch in excess of $50,000."

The parties also agreed that:

> ". . each of the parties hereto reserves the right to offer evidence at the trial of this case with respect to any issue of fact under the pleadings in this case which has not been resolved by the stipuation of facts hereinabove set forth, provided that:
>
> (a) The party intending to offer such evidence shall give written notice thereof to the other parties within thirty days from the date hereof . "

Walker Bank gave no notice that it intended to offer any additional evidence at any time prior to trial and offered no evidence at trial. The First National Bank gave notice that it intended to offer evidence and thereafter the parties stipulated as to such evidence. In the

second stipulation dated June 18, 1964, the parties stipulated that if Ronald S. Hansen were called to testify he would show that The First National Bank was agent for the Federal Reserve Bank to act for it in the event of emergency and the branch bank would contain a large safe to permit The First National Bank to have the additional vault space necessary to act as such agent thus relieving the Walker Bank of the necessity of storing additional cash and currency in the event of a national emergency.

On June 30, 1964, the parties stipulated that:

> "The case is hereby submitted to the court for its decision on the merits upon the facts stipulated to by the parties and set forth in the Stipulation of Facts and other matters, dated April 24, 1964 and filed herein, and the Stipulation between plaintiff and the defendant, The First National Bank of Logan, dated June 18, 1962, and filed herein . "

At the hearing before the trial court on September 15, 1964, the defendant First National Bank moved to dismiss on the grounds of lack of jurisdiction which motion was denied without opinion by the District Court. In its Memorandum Decision of September 30, 1964, and in its Judgment of October 9, 1964, the trial court makes no finding of facts relating to jurisdiction and makes no conclusions that it has jurisdiction. The District Court said that since Utah State law expressly authorized a branch bank in Logan, Utah, The First National Bank was not required by the Federal law to comply with the State's procedural requirement of taking over another unit bank (since there was no unit bank The First National Bank

could have taken over.) The District Court dismissed the Plaintiff's complaint.

Walker Bank appealed the decision. The First National Bank did not cross-appeal but in its brief suggested (as provided in Federal Rules of Civil Procedure, Rule 12 (h) (2), 28 United States Code) that the United States Court of Appeals should sustain the dismissal of the complaint on the grounds that the District Court lacked jurisdiction because the amount in controversy alleged by the plaintiff had not been proved. On October 26, 1965, the United States Court of Appeals Tenth Circuit, entered its decision reversing the District Court and holding that The First National Bank must comply with all provisions of state law before it can branch and the case was remanded to the District Court for a decision on The First National Bank's affirmative defenses relating to standing to sue, laches, and constitutionality of the Utah Statute. The decision of the Court of Appeals was silent as to whether the District Court was correct in denying the motion to dismiss on the grounds of lack of jurisdiction and there is nothing in the decision which specifically finds that the District Court had jurisdiction or whether the facts as stipulated by the parties show an amount in controversy in excess of $10,000. The First National Bank petitioned for a rehearing on the grounds of lack of jurisdiction which petition was denied without opinion on December 3, 1965.

REASONS FOR GRANTING WRIT

The decision of the United States Court of Appeals, Tenth Circuit, should be reviewed because:

1. *The decision of the Court of Appeals in declining to dismiss because of lack of jurisdiction is in conflict with two decisions of The Supreme Court of the United States.*

The first case of KVOS v. Associated Press (1936) 299 U. S. 269, 81 L.ed 183, 57 S. Ct. 197 involved an action by the Associated Press against a radio station to enjoin it from pirating news broadcast items gathered by the Associated Press and distributed to its members. The complaint alleged:

> " . the damage to which complainant is being subjected . . is in excess of the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, and the amount involved herein and in controversy herein is in excess of said sum . .
>
> " . . and the continuance by (KVOS) of its practice will increasingly cause irreparable injury and damage to the (Associated Press) because the effort and expenditures to gather and obtain news will be rendered largely without reward or value so far as concerns the territory served by petitioner's station."

It will be noted that the allegations of Associated Press go further than the allegations of Walker Bank and give a reason for the irreparable damage while Walker Bank merely alleged the jurisdictional amount and irreparable injury.

KVOS filed a motion to dismiss on the grounds that "complainant has not lost any amount and never will lose any amount by reason of this controversy" which is virtually identical with The First National Bank's defense

that the Walker Bank has not been and will not be damaged by its branch. But The First National Bank went further and alleged that its branch may even be a benefit to Walker Bank.

The Supreme Court said the District Court found:

> " . the amount in controversy herein, by reason of the defendant's motion to dismiss, must be construed to be in excess of $3000.00 exclusive of interest and costs (and) found the facts as to the business and conduct of the parties substantially as alleged in the complaint . "

And as conclusions of law:

> " . that (the court) had jurisdiction of the parties and the subject matter . . (that) the acts of (KVOS) did not amount to unfair competition . and did not violate their property rights . "

The District Court dismissed the complaint on the merits.

The District Court here also denied the defendants' motion to dismiss on grounds of lack of jurisdiction and since it did not make any findings that Walker Bank had been or would be damaged by defendant's branch, the Court must have construed the defendant's motion as requiring it to conclude that the amount in controversy must be over the jurisdictional amount as did the District Court in the KVOS case. The District Court also found on the merits as did the District Court in the KVOS case that no injunction should issue.

In the KVOS case the Circuit Court of Appeals

reversed the District Court. In dealing with the question of jurisdiction the Circuit Court said:

> "The several millions of dollars here alleged to be invested in the Association's business may well be damaged to the extent of $3,000.00 by the pirating practices described."

The assumption that the Associated Press may be damaged because of its large investment was rejected by the United States Supreme Court when it said:

> " . . we hold that in the circumstances the respondent (plaintiff, Associated Press) had the burden of showing that the case was within the District Court's jurisdiction, and failed to carry it .
>
> " . The right for which the suit seeks protection is, therefore, the right to conduct those enterprises free of the alleged unlawful interference by the petitioner. No facts are pleaded which tend to show the value of that right. The complaint contains nothing to the purpose save the general statement that the damage to which the respondent is being subjected is in excess of three thousand dollars . .
>
> " . But where the allegeations as to the amount in controversy are challenged by the defendant in an appropriate manner, the plaintiff must support them by competent proof . .
>
> " . Assuming, without deciding, that in the circumstances disclosed the respondent has standing to maintain a suit to redress or prevent damage caused its members by petitioner's conduct, the allegation of possible damage to them is wholly inadequate, because the asserted danger of loss of members is a

mere conclusion unsupported by even a suggestion that withdrawal has been threatened by any newspaper, and no intimation is given of the character or extent of the damage they would suffer by such withdrawal. The respondent having failed to support the allegations as to amount in controversy the District Court should have dismissed the bill.

"The Circuit Court of Appeals sustained the District Court's jurisdiction on the grounds that the finding upon that point (jurisdiction) was not without support, and the appellate tribunal could not say it was wrong, in view of the magnitude of the respondent's operations and expenditures . . these factors are irrevelant upon the issue of the value of the right for which protection is here sought."

Here Walker Bank had the burden of showing the case was within the District Court's jurisdiction and failed to sustain it. Even though it is not alleged (which makes this case even weaker than the argument used by Associated Press in the KVOS case) we assume that the right for which Walker Bank's suit seeks protection is that it should be free to conduct its branch operations in Logan without interference by The First National Bank's branch. But as in the KVOS case no facts are pleaded or proved which show the value of that right. The general allegations of damage and injury were challenged by The First National Bank in its answer. The United States Supreme Court said that in such case the plaintiff must support them by competent proof. Even though Walker Bank did not allege it would lose customers and business if The First National Bank's branch continued operations, if we assume that it intended such allegation to be included

in its 'irreparable injury" allegation, the Supreme Court says that this is insufficient because "no intimation is given of the character or extent of the damage they would suffer by such withdrawal" or loss of customers. Walker Bank said it had a large investment and does a large business in Logan, but the United States Supreme Court held that these matters are "irrevalent upon the issue of the value of the right for which protection is here sought."

Walker Bank offered no evidence of present or future damage. In such case the Supreme Court held in the KVOS case:

> "Since the allegation as to amount in controversy was challenged in an appropriate manner, and no sufficient evidence was offered in support thereof, the bill should have been dismissed."

The second case of McNutt v. General Motors Acceptance Corp. (1936) 298 U. S. 178, 80 L. ed. 1135, 56 S. Ct. 780, involved an action by General Motors to enjoin the enforcement of a statute dealing with installment sales. The District Court granted an injunction and the case went to The United States Supreme Court on direct appeal. The Court said:

> "The question arises whether the matter in controversy exceeds the sum or value of $3,000 . . so as to give the District Court jurisdiction . The complaint alleged that the requisite amount was involved and this allegation was denied by the answer."

The identical situation is involved here where Walker Bank's allegation was denied by the defendants.

"Respondent points to the allegations of its bill that the net worth of its business exceeds $50,000; that it purchased retail installment contracts in Indiana aggregating in excess of $7,000,000 . "

Here it was stipulated that Walker Bank has an investment in Logan in excess of $50,000 in buildings and fixtures and that it has outstanding loans of $5,000,000. The facts are almost identical as to jurisdiction.

The Supreme Court said:

"Respondent invokes the principal that jurisdiction is to be tested by the value of the object or right to be protected against interference. But in the instant case the statute does not attempt to prevent respondent from conducting its business."

The authorization to The First National Bank to operate a branch does not attempt to prevent Walker Bank from conducting its business.

"The value or net worth of the business which respondent transacts in Indiana is not involved save to the extent that it may be affected by the incidence of the statutory regulation. The object or right to be protected against interference is that right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed. The particular allegations of respondent's bill as to extent or value of its business throw no light upon that subject. They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegation as to

jurisdictional amount save the general allegation that the matter in controversy exceeds $3000. That allegation was put in issue and the record discloses neither finding nor evidence to sustain it."

Here the value of Walker Bank's business is not involved save to the extent that it may be affected by the operation of defendant bank's branch. The value of that right may be measured by the loss, if any that follows from defendant's branch operation. The allegations of Walker Bank's complaint throw no light upon that subject. There are no facts alleged showing what, if any, curtailment of business and consequent loss the operation of defendant's branch would involve. The complaint is thus destitute of any appropriate allegation as to jurisdictional amount, save the general allegation as to jurisdictional amount. That allegation was put in issue by defendant's answer and the record discloses neither finding nor evidence to sustain it.

In holding that the Plaintiff has the responsibility of pleading and proving the facts necessary to give the District Court jurisdiction the Court said:

"The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. . If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must

support them by competent proof. And where they are not so challenged the court may still insist that jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand the party alleging jurisdiction justify his allegations by a preponderance of evidence."

Walker Bank having failed to prove any present or future damage by reason of the operation of defendant's branch and the allegations of the jurisdictional amount having been denied the conclusion of this case should be as stated by the Supreme Court:

"Here the allegation in the bill of complaint as to jurisdictional amount was traversed by the answer. The court made no adequate finding upon that issue of fact, and the record contains no evidence to support the allegations of the bill. There was thus no showing that the District Court had jurisdiction and the bill should have been dismissed on that ground."

In the past, as indicated in the aforementioned cases, The Supreme Court has zealously guarded against the lower courts extending their jurisdiction beyond that granted by Congress. And recently The Supreme Court sustained Congressional enactments which protect National Banks from being sued by any one at any place in any court. (See Michigan National Bank v. Robertson (1963) 372 U. S. 591, 9 L. ed. 2d 961, 83 S. Ct. 914, and Mercantile National Bank v. Langdeau (1963) 371 U. S. 555, 9 L. ed 2d 523, 83 S. Ct. 520.)

It is respectfully submitted that jurisdictional questions should be equally as important as questions of venue

and that if a Federal District Court can permit a suit against a National Bank by a state bank regardless of whether the complainant shows an amount in controversy in excess of $10,000, it is time for The Supreme Court to clarify the rule with regard to jurisdiction of Federal Courts over suits against National Banks or the Congressional enactments with respect thereto will be meaningless. If a Federal District Court can ignore the amount in controversy limitation imposed by Congress where a National Bank is involved, then the question can be ignored in any suit brought in Federal Court. If Federal Courts can waive jurisdictional requirements whenever desired, then litigants no longer have equal opportunity to invoke the jurisdiction of Federal Courts, but their rights depend on human desires and not on due process of law.

2. *The decision of the Court of Appeals for the Tenth Circuit in holding that National banks are subject to the identical restrictions of state laws as state banks in establishing branches within the limits of their own community is in conflict with the decision of the Court of Appeals for the Fourth Circuit in holding that National banks are not subject to the same restrictions of state law as state banks. The decision also decided an important question of Federal branch banking law which has not been, but should be settled by the Supreme Court.*

The Court of Appeals for the Tenth Circuit asked this question in this case (see Appendix II, pages 32, 33):

"Does 12 U. S. C. Section 36 (c) (1) require the Comptroller to withhold his certificate of approval for

the establishment of a national bank branch unless the branch is authorized in all respects by the law of the State in which the bank is located?"

The Court then answered the question in the affirmative and later in the decision said (see Appendix II, page 38):

> "We believe the proper approach is for the Comptroller to look at all the State law on branch banking not just part of it."

In First National Bank of Smithfield, North Carolina vs. Saxon, (decided October 21, 1965 No. 9795, 9796), the Court of Appeals for the Fourth Circuit said in ruling on the law a National bank must follow in obtaining a branch in Smithfield, North Carolina:

> "Protestant Smithfield Bank also contends that the Comptroller's approval is contingent upon his compliance with the inquiries and ascertainments required of the State Commissioner of Banks by the North Carolina statute . . We disagree with that argument."

So in the Tenth Circuit a National Bank must show the Comptroller that it has complied with all provisions of state law before it can have a branch, but a National Bank in the Fourth Circuit must only show that state banks are authorized to have branches and then rely upon the Comptroller to determine whether the economic factors justify a branch. In the Tenth Circuit the Comptroller cannot authorize a branch by a National bank even though he finds economic factors from the point of view of the Federal Government require a branch and even

though State law expressly authorizes a branch, if the National bank fails to show compliance with some economic or procedural requirement of State law.

Because the rapidly expanding economy of the country requires additional banks and branches to satisfy the demands of business, the conflict between the Circuit Courts will result in considerable litigation and uncertainity as to legality of banks and branches unless the question is settled at this time by The Supreme Court. (See also recent ruling of Judge Fox in American Bank and Trust Company v. Saxon and Dart National Bank, Mich. West District ..... F. Supp. .....).

At the present time there are thirty-four states which permit branch banking subject to certain state statutory restrictions (see Appendix I). These states have statutes which expressly authorize branch banking by state banks but in addition impose economic and procedural limitations such as:

1. Approval by the State Banking Commissioner.
2. Finding by the State Banking Commissioner on questions of:
   a. If financial history and general condition of applicant bank and future earnings prospect warrant establishment of branch.
   b. Economic needs and convenience of community to be served.
   c. Probable volume of business in such community.

3. Capitalization requirements.

4. Existence of other banks in community.

5. Existence of one unit bank in community as barring that unit bank from branching.

In writing subsection (c) of Title 12, Section 36, United States Code, Congress did not specifically impose any state restrictions on the establishment of National bank branches located within the same city limits as the parent bank, but Congress specifically made establishment of National bank branches outside the city limits where the main bank is located subject to location restrictions of state law and subject to capitalization restrictions of state law. The Court of Appeals for the Tenth Circuit said that notwithstanding the lack of specific restrictions mentioned by Congress, National banks are nevertheless subject to all restrictions of state law in establishing branches within their own community. In states following the decision of the Tenth Circuit, the Comptroller of the Currency will be restricted by state procedural laws in his efforts to permit branches to meet the banking needs of the nation. But in states following the decision of the Fourth Circuit, the Comptroller will not be limited by state procedural requirements in authorizing branches in accordance with the economic needs of the nation. The conflict in decisions seems destined to result in further litigation unless the question is resolved by The Supreme Court.

The holding of the Tenth Circuit Court of Appeals raises a serious question as to whether National Banks

under jurisdiction of Courts following the language of its opinion should in their own interest convert to state banks. If a National bank must comply with all the requirements of state law before it can have a branch, then the National bank apparently must go through a hearing (as required by state statutes) to satisfy the State Banking Commissioner that a branch is required and then submit to a second examination by the Comptroller of the Currency as to whether there is a need for a branch and whether the applying bank can fill that need. Pending completion of the examination by the Comptroller, a state bank competitor can use the findings of the State Banking Commissioner as authority to establish a new branch in the area planned by the National bank and as a result the Comptroller may be forced to reject the National bank's application. In any event the inconvenience of having to meet the requirements of two hearing commissioners would probably offset any other advantages in remaining a part of the National banking system. If a large number of National banks converted to state banks in the thirty-four states affected, the result would have a serious effect on the ability of the Congress to provide for the currency and banking needs of the nation.

This Court has held on many occasions that the states cannot frustrate the purposes of National banks or impair their efficiency and the actions of the Comptroller of the Currency are subject to state restrictions only when, and only to the extent that Congress has stipulated. Mercantile National Bank v. C. H. Langdeau, (1963) supra.; Van Reed v. Peoples' Nat. Bank of Lebanon (1905) 198 U. S. 554, 25 S. Ct. 775, 49 L. ed. 1161; Davis v. Elmira

Savings Bank (1896) 161 U. S. 275, 16 S. Ct. 502, 40 L. ed. 700; Franklin National Bank v. New York (1954) 347 U. S. 373, 74 S. Ct. 550, 98 L. ed. 767; and First National Bank in St. Louis v. Missouri (1924) 263 U. S. 640, 44 S. Ct. 213, 68 L. ed. 486. In order that the efficiency of National banks will not be impaired by the conflict in decisions which leaves the legality of established branches in question, and the legality of proposed branches and the methods of obtaining approval of the same in doubt, it is respectfully requested that The Supreme Court grant a writ of certiorari so that the intent of Congress in enacting the branch banking law will be clarified.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX I

Summary of Branch Banking Statutes of the 34 States permitting Branch Banking.

Alabama

Acts of 1953, 1955, 1957; Code of Alabama, Title 5, Sec. 125(1).

Alaska

Alaska Statutes, 1962, Sec. 06.05.415.

Arizona

Arizona Revised Stat. Anno., Sec. 6-223 (1956).

California

Calif. Financial Code Anno., Sec. 500 (1955).

Connecticut

Gen. Stat. of Conn., Revision of 1958, Sec. 36-59.

Delaware

2 Del. Code Anno., Title 5, Sec. 770 (Supp. 1962).

Georgia

Code of Ga. Anno., Sec. 13-203-1.

Hawaii

Revised Laws of Hawaii, C. 178, Sec. 39.

Idaho

Idaho Code, Sec. 26-1001 (Supp. 1963).

Indiana

5 Burns Ind. Stat. Anno., Sec. 18-1707.

Kentucky

Ky. Revised Stat., Sec. 287.180.

Louisiana

La. Revised Stat., Sec. 6:54 (1951).

Maine

Revised Stat. of Maine, Ch. 59, Sec. 19-C (1963 Supp); Ch. 59, Sec. 124 (1963 Supp.).

Maryland

Anno. Code of Md. 1957, Art. 11, Sec. 65.

Massachusetts

Mass. Gen. Laws Anno., Ch. 172, Sec. 11 (1963 Supp.); Ch. 172 A, Sec. 12.

Michigan

Mich. Stat. Anno., Secs. 23.762, 23762(1).

Mississippi

Miss. Code, Secs. 5228, 5229.

Nevada

Nevada Revised Stat., Sec. 660.010 (1960).

New Hampshire

N. H. Rev. Stat. Anno., Sec. 384-B:2 (1963 Supp.).

New Jersey

N. J. Stat. Anno., Sec. 17:9A-19.

New Mexico

N. M. Stat. Anno., Sec. 48-2-17.

New York

Book 4, Banking Law, Sec. 105.

North Carolina

Gen. Stat. of N. C., Sec. 53-62 (Supp. 1963).

Ohio

Page's Ohio Revised Code Anno., Title 11, Sec. 1103.09.

Oregon

Oregon Rev. Stat., Sec. 714.050.

Pennsylvania

Purdon's Pa. Stat. Anno., Title 7, Sec. 819-204.1.

Rhode Island

Gen. Laws of R. I., Sec. 19-1-13 (1956).

South Carolina

Code of Laws of S. C., Sec. 8-57 (1962).

South Dakota

S. D. Code of 1939, Sec. 6.0402.

Tennessee

Tenn. Code Anno., Sec. 45-211.

Utah

Utah Code Anno., Sec. 7-3-6 (Supp. 1963).

Vermont

Vermont Stat. Anno., Title 8, Sec. 501 (1958).

Virginia

Code of Va., Title 6, Art 3, Sec. 6-26.

Washington

Revised Code of Wash. Anno., Sec. 30.40.020 (1961).

APPENDIX II

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER TERM, 1965

WALKER BANK & TRUST COMPANY, a corporation,

Appellant,

vs.

JAMES J. SAXON, Comptroller of the Currency; and THE FIRST NATIONAL BANK OF LOGAN, of Logan, Utah, a National banking association,

Appellees.

} Number 7981

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Joseph S. Jones (C. E. Henderson and Ray, Rawlins, Jones & Henderson on the brief) for Appellant;

David L. Rose, Attorney, Dept. of Justice, (John W. Douglas, Ass't. Attorney General, William T. Thurman, U. S. Attorney and Kathryn H. Baldwin, Attorney, Dept. of Justice on the brief) for Appellee James J. Saxon, Comptroller of the Currency.

Ted S. Perry of Perry & Perry for Appellee, The First National Bank;

Brief filed by James F. Bell for Amicus Curiae.[1]

[1] Leave was granted to the National Association of Supervisors of State Banks to file a brief in the case as amicus curiae.

Before PHILLIPS, PICKETT and HILL, United States Circuit Judges.

Hill, Circuit Judge.

Appellant, Walker Bank and Trust Company, brought this action in the court below against appellees, the Comptroller of the Currency and The First National Bank of Logan, to obtain a declaratory judgment decreeing the action of the Comptroller, in authorizing The First National Bank of Logan to establish and operate a branch bank in Logan, to be void and of no legal effect.

Both defendants, by separate answers, alleged the validity of the questioned action of the Comptroller and the defendant bank, in addition, raised the affirmative defenses of (1) lack of standing to sue on the part of the plaintiff, (2) estoppel, and (3) that the Utah statute governing the establishment of branch banks is unconstitutional. The trial court, by memorandum opinion, held that the action of the Comptroller was valid and therefore found it unnecessary to pass on any of the affirmative defenses raised. Appellant appealed from that decision.

The facts pertinent to this appeal may be briefly stated. Appellant is a banking corporation organized under the laws of Utah, with its main bank located in Salt Lake City and with a branch bank in Logan. Appellee, The First National Bank of Logan, is a banking corporation organized under the National Banking Act maintaining its principal bank in Logan, a city of the second class. On January 21, 1963, the appellee, Comptroller of the Currency, after application, issued a certificate to

The First National Bank of Logan, authorizing it to establish and maintain a new and separate branch bank in Logan in addition to its main bank. Our sole question pertains to the authority of the Comptroller to issue such a certificate.

We must first look to the Federal and State statutes pertinent to our question. The beginning point is 12 U.S.C. § 36(c), as amended, part of which provides:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town, or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; • • • •"

(c) (2) of § 36 is set forth below[2] and covers specifically socalled "outside branches," that is branches outside the city of the parent bank. Since our facts disclose that we are only concerned with (c) (1) or "inside branches," that is a branch bank located within the same city or town as the parent, we need not pass on (c) (2). Con-

[2] 12 U.S.C. § 36(c) (2) provides in pertinent part:

"A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. • • • "

sideration of it in this case will be confined primarily to whatever light it might shed on (c) (1).

The Utah Code Ann., Title 7, Chap. 3, § 6 (1953 as amended) provides as follows:

> "Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years."

The parties stipulated that Logan, Utah, is not a city of the first class. Therefore, it is perfectly clear that in Logan, a state bank could not establish a branch bank unless it took over an existing bank which had been in operation for five previous years. The Supreme Court of Utah in Walker Bank & Trust Co. v. Taylor, 15 Utah 2d 234, 390 P.2d 592 (1964) in construing this Utah statute in regard to Provo, Utah, which like Logan is a city of the second class, held that the only way a branch state bank could be established in a city of less than the first class having an existing unit bank is by taking over such existing bank. The obvious question then to decide is this: Does 12 U.S.C. § 36(c) (1) require the Comptroller to withhold his certificate of approval for the

establishment of a national bank branch unless the branch is authorized in all respects by the law of the State in which the bank is located? The court below answered this question in the negative resting its opinion on the premise that § 36(c) (1) embodies only the requirement that inside branching be "expressly authorized" to State banks by the State law without other conditions or restrictions of State law. In other words, even though a state bank in an identical situation with that presented here could not establish a branch bank, nevertheless a national bank could because state law generally sanctions branch banking. For the reasons hereinafter stated, we disagree with the trial court and hold that 12 U.S.C. § 36(c) (1) provides, as Congress intended it should, that the measuring stick of national branch banks is state law.

The history of national bank legislation spans over one hundred years. The present Act was derived from the Act of June 3, 1864, 13 Stat. 99, which was the National Bank Act. During this period, a multitude of changes in the Act have occurred as various economic problems were encountered. The provisions of the Act affecting branch banking entered the scene in 1927. Before that time branch banking was not generally sanctioned by Congress. See First National Bank v. Missouri, 263 U.S. 640. The Court there noted that the various state laws are binding on the dealings and contracts of national banks unless and until those laws conflict with federal laws or frustrate the purpose for which national banks were created or impair their efficiency. With national banks unable to branch, state banks did branch where state law permitted placing the national banks at a considerable disadvantage

in the competitive banking field. It was against this background that Congress provided for national bank branches in the McFadden Act of 1927, 44 Stat. 1224, 1228 on branch banking.[3] Congressman McFadden reported on this bill from the Committee on Banking and Currency. In the beginning, the Committee Report states, "Some of the provisions in the bill extend and enlarge the powers of national banks, but only in the manner in which State banks and trust companies generally have been successfully operating within recent years."[4] Later in the same report in discussing Section 8 it is stated, "This section recognizes the right of national banks to establish branches within those cities in which State banks have that privilege * * *." Finally, the report concludes in part with, "The cumulative effect of its provisions will produce a situation in the Federal reserve system where the rights of the national banks will be more nearly on a par with those of the State member banks." It seems clear to us at this juncture, that Congress meant in the McFadden Act to put national banks on a par with state banks insofar as branching was concerned, and to do this, they made state law controlling on the question of national bank branches. But our investigation of the history of branch banking cannot end here, for in 1932, owing to the financial crisis of those times, Congress again considered branching by national banks.

[3] "(c) A national banking association may, after the date of the approval of this Act, establish and operate new branches within the limits of the city, town, or village in which said association is situated if such establishment and operation are at the time permitted to State banks by the law of the State in question."

[4] H.Rept. No. 83, 69th Cong., 1st Sess. (1926).

In 1932 the Senate considered a bill (Senate Bill 4412) which would allow branch banking by national banks irrespective of the various state laws. Senator Glass, the committee chairman, did point out at the time that this was a highly controversial subject[3] The main objection the opponents had to this bill concerning the branching provision was that it would constitute an invasion of the sovereign rights of the states to establish federal banks within their boundaries not approved by local policy. Apparently at this time, most states did not approve of branch banking.[4] It was at this time that Senator Bratton[5] of New Mexico offered his amendment to the bill which as modified was finally passed. We deem Senator Bratton's comments in regard to the bill highly noteworthy when in Vol. 76, Cong. Rec. p. 1449, he indicated that under existing law a national bank may engage in branch banking if the law of the state where the national bank is situated permits state banks to do so. Then in commenting on the Glass bill he said, "It is proposed to permit national banks to engage in branch banking whether the law of the State in which a given bank is located permits it or not. It is proposed now to permit national banks to disregard the sentiment of a given State with respect to that question. I think the proposed bill goes too far. It seems to me that the question of whether

[3] Cong. Rec. Vol. 75, p. 9890.

[4] See Cong. Rec. Vol. 75, pp. 9891, 13,002; Vol. 76 pp. 1449, 1997, 2079, 2080, 2090, 2205, 2206.

[5] The Honorable Sam G. Bratton later became a distinguished and highly esteemed member of this court, serving from 1933 until his retirement in 1961.

branch banking shall be permitted in a given State should be determined by the State." The Bratton Amendment was then presented and adopted in the Glass bill.[8] This amendment concerning branch banking also expanded national banks into outside branches or branches outside the city or town of the parent bank. This is (c) (2) of the present section concerning such banks.

Although the Glass Bill including the Bratton Amendment passed the Senate, it failed to pass the House until the next session when the bill was passed by both houses with the Bratton Amendment intact. Two other Congressional comments made in 1933, when § 36 (c) was under consideration in the Congress, one by Senator Glass[9] and

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[8] Cong. Rec. Vol. 76, p. 2205. The amendment read as follows with its amendment.

"(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches within the limits of the city, town, or village, or at any point within the State in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question and subject to the restrictions as to location imposed by the law of the State on State banks. No such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a paid-in and unimpaired capital stock of not less than $500,000."

[9] Senator Glass, in Vol. 77 Cong. Rec. 3726 (1933) said:

"There was another more or less important provision of the bill passed last spring which is retained in text in this bill, relating to branch banking. It will be recalled that, as reported from your Banking and Currency Committee, the provision authorized national banks to engage in branch banking in the respective States, regardless of State law. The Senate so amended that provision as to authorize national banks to engage in branch banking in those States which by law permit branch banking to State Banks. It went even further under the amendment of the distinguished Senator from New Mexico, and required that the establishment of branch banks by national banks in States which

the other by Congressman Luce,[39] support our interpretation of this statute.

With this, our review of the history of branch banking and § 36(c) ends. From it all, we are led to the inescapable conclusion that the purpose of allowing national banks to branch was to enable them to fairly compete with state banks. In enabling them to do this, Congress said in the McFadden Act that State law will in each instance determine whether to permit a national bank to branch. This policy was again carried over in the Banking Act of 1933 through the Bratton Amendment despite the fact that originally the Glass bill sought to change that policy. It seems to us a frustration of that policy to say as the trial court did that merely because

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by law permit branch banking should be under the regulations required by State law of State banks.

"How any fair person may properly object to a provision of that sort, I do not understand. We here in the Congress created the national banking system in the emergency of the Civil War. We here restrict it and regulate it. We here legislate for the national banking system; and why anybody should object to putting national banks on a plane of competitive equality with State banks in the respective States we have been unable to understand. Therefore, we have included that provision in this bill just as it passed the Senate."

[39] Congressman Luce stated in Cong. Rec. Vol. 77, p. 5896:

"In the controversy over the respective merits of what are known as 'unit banking' and 'branch banking systems,' a controversy that has been alive and sharp for years, branch banking has been steadily gaining in favor. It is not, however, here proposed to give the advocates of branch banking any advantage. We do not go an inch beyond saying that the two ideas shall compete on equal terms and only where the States make the competition possible by letting their own institutions have branches. In short, we say that if a State invites the race, let the better horse win. That system which proves itself the better able to serve the people will in the end prevail."

a state in a broad general way sanctions branch banking, that is enough to permit a national branch, even though other vital provisions of state branching laws are not met. In other words, we believe the proper approach is for the Comptroller to look at all the State law on branch banking not just part of it." While we entertain no doubt of Congress' authority to regulate national banks in whatever way it deems fit, we are convinced that in this area of the law, Congress has restricted its power and acceded to state law which it may certainly do. It is clear to us that the Congress intended to create and maintain a competitive equality between state and national banks. The trial court's interpretation of Congressional intent is to the contrary and would result in giving the national banks a substantial competitive advantage. The Comptroller exceeded his statutory authority in the issuance of the certificate authorizing appellee bank to establish and maintain the branch bank.

We will refrain from passing on any of the affirmative defenses raised by the answer of the First Natoinal Bank of Logan because the trial court must properly be

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" For other cases tending to support this view although each construing § 36(c) (2) dealing with outside branches instead of (c) (1) see the following. National Bank of Detroit v. Wayne Oakland Bank, 6 Cir., 252 F.2d 537, cert. denied, 358 U.S. 830; State of South Dakota v. National Bank of South Dakota, 219 F. Supp. 842; Commercial State Bank of Roseville v. Gidney, 174 F. Supp. 770, aff'd per curiam, 278 F.2d 871 (D.C. Cir. 1960); and see Rushton Ex Rel. Comr. of Bkg. v. Michigan National Bank, 298 Mich. 417, 299 N.W. 129, 136 ALR 458. We also note, in a factually similar case construing (c) (1) from Utah decided by the U.S. District Court, District of Columbia, held exactly as we do here. Commercial Security Bank v. Saxon, 236 F. Supp. 457 (1964). (Affirmed on appeal without opinion).

given the first opportunity to determine their merits, if any. The judgment of the trial court is REVERSED and the case is REMANDED with directions to reopen the same for the taking of any additional evidence, if offered, on the remaining issues and to make appropirate findings of fact and conclusions of law not inconsistent herewith.